UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

4200 AVENUE K, LLC AND INTEGRITY MAINTENANCE, LLC
Employer

and Case No. 29-RM-900

LOCAL 32B-32J,SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Jonathan Chait, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record reveals that 4200 Avenue K, LLC, herein called Employer 4200, a domestic corporation, is engaged in the ownership of real property including properties located at 4200 and 4211 Avenue K, Brooklyn, New York. The record further reveals that Integrity Management, a domestic corporation, herein called Employer Integrity, with a place of business located at 1274 49th Street, Suite 244, Brooklyn, New York, is engaged in the management of real estate, including properties located at 4200 and 4211 Avenue K, Brooklyn, New York. The parties further stipulated that Employer 4200 and Employer Integrity, herein collectively called the Employer, are joint employers with respect to the bargaining unit involved herein, because they formulate and administer a common labor policy affecting the employees in said unit.

The parties also stipulated that annually each derives gross revenues in excess of $500,000 and purchases and receives heating oil and other products and materials valued in excess of $5,000 from suppliers located within the State of New York, said goods and materials having originated from outside the State of New York.

Based on the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. I further find that Employer 4200 and Employer Integrity are joint employers of the petitioned-for unit.

3. The labor organization involved claims to represent certain employees of the Employer.

4. The Union contends that the circumstances in this case do not meet the Board's newly enunciated test for raising a question concerning representation for a petition filed by an employer[1] and, therefore, the petition should be dismissed. The Employer argues to the contrary and contends that the continued processing of the petition is warranted. For the reasons set forth below, I find that a valid question concerning representation has been raised and conducting an election is appropriate.

The record reveals that Employer 4200 purchased the properties located at 4200 and 4211 K Street, Brooklyn, New York, on or about February 16, 1999 (Jt. Exh. 3). At that time, the Union represented the employees employed at those facilities. The Union and the former owner were parties to a collective bargaining agreement, which was effective, by its terms, from April 21, 1997, to April 20, 2000. The Employer adopted that contract.

The 1997-2000 agreement provides, at Article XVIII, that upon the expiration date, the contract remains in full force and effect for an extended period until a successor agreement has been reached. The provision further provides that during the

[1] . *Levitz Furniture Company of the Pacific, Inc.*, 333 NLRB No. 108 (2001).

extended period, all the terms and conditions of the expired agreement remain in effect while the parties negotiate for a successor contract. In the event the parties are unable to reach agreement, either party can terminate the agreement upon ten days notice.

By letter dated, April 28, 2000, the Employer, by its counsel, gave notice of cancellation of the contract (Jt. Exh. 4). By letter dated June 6, 2000, the Employer, by its counsel, advised the Union that it was withdrawing recognition from the Union based upon objective evidence that a majority of unit employees no longer supported it (Jt. Exh. 5). By letter dated October 6, 2000, counsel for the Union advised the Office of the Contract Arbitrator, that the Union was invoking the contract's arbitration provision because of the Employer's above-described conduct and was seeking as a remedy, *inte*r *alia*, past fund contributions, unpaid wages and a directive that the Employer negotiate a successor collective bargaining agreement (Jt. Exh. 6). As of the date of the hearing herein, the processing of that grievance was ongoing. On October 13, 2000, the Union filed an unfair labor practice charge in Case No. 29-CA-23842, alleging, *inter alia*, that the Employer unlawfully cancelled the aforementioned contract and withdrew recognition at a time when it was not privileged to do so. The Union withdrew that charge on December 13, 2000.

On November 7, 2000, the Employer filed an action in New York State Supreme Court seeking to stay the arbitration. On November 20, 2000, that action was removed to the United States District Court for the Southern District of New York. By order dated April 2, 2001, the Employer's request for a stay of arbitration was denied (Jt. Exh. 7).

The Union claims that the instant petition should be dismissed because the evidence, which allegedly supports the Employer's uncertainty of the Union's majority status giving rise to the instant petition, was tainted by misconduct by the Employer. The Employer argues to the contrary, and claims the petition is supported by untainted evidence calling into question the Union's majority status.

The issue raised by the Union with respect to the acceptability of the evidence supporting the petition is the subject of an administrative investigation and will be addressed in that venue. This notwithstanding, the circumstances surrounding this matter raises a related but different issue regarding the presence of a question concerning representation. The record reveals that the Employer withdrew recognition from the Union on June 6, 2000. The Union contested the legality of this action in a grievance filed on October 6, 2000, and in an unfair labor practice charge filed on October 13, 2000. As noted above, that charge was withdrawn on December 13, 2000. There is no pending timely charge which places in issue the lawfulness of the Employer's action in withdrawing recognition and the termination of the Union's status as the Section 9(a) representative of the employees in the bargaining unit. Thus, the legality of such conduct is no longer subject to Board scrutiny and must, therefore, be accepted as lawful.

In light thereof, the Union's conduct subsequent to June 6, 2000, must be examined to see if it raises a true question concerning representation. On October 6, 2000, the Union initiated arbitration proceedings against the Employer seeking*, inter alia*, reinstatement of its Section 9(a) status as the collective bargaining representative of the Employer's employees in the unit in dispute, by requiring the Employer to bargain for a successor contract. Previously, in June 2000, the Employer had withdrawn recognition. The Union abandoned any chance for the Board to find that withdrawal of recognition to be unlawful when it withdrew, in December 2000, its October 2000, charge which alleged that the Employer unlawfully withdrew recognition. Thus, as of the time in December 2000, that the Union withdrew its charge, no further challenge to the Employer's withdrawal of recognition was available. Nonetheless, it maintained the

arbitration action seeking a bargaining order against the Employer despite that their bargaining relationship had lawfully ended. Thus, it would appear that the Union's pursuit of its arbitration case, wherein it seeks an affirmative bargaining order, constitutes a demand for recognition, which may properly support the processing of petition. In *Carr-Gottstein Foods Company, Inc*., 307 NLRB 1318 (1992), the union involved therein sought review of a regional director's Decision and Direction of Election based upon a petition filed by the employer. The union was already the representative of a unit of the employer's employees and, through the grievance procedure, sought to add to its existing unit, employees employed in a newly opened department in the Employer's operation (OE). At one point it appeared that another union, the United Food and Commercial Workers Union, also sought to represent these same employees. As a result of an Article XX procedure invoked by the union, an umpire with the AFL-CIO ruled that the employees in issue were part of the union's existing bargaining unit. The Board disagreed and concluded that these employees did not constitute an accretion to the existing unit. Thus, the umpire's award was at odds with the Board's determination. In response to the union's contention that the Board should be bound to the umpire's Article XX determination, the Board held:

> "The Board will not defer the determination of questions of representation, accretion, or unit appropriateness to arbitrators, as they involve application of statutory policy and are singularly within the Board's province... Should the Board dismiss the instant RM petition on the ground that there was no demand by the Union to represent a separate unit of (OE) employees, then by virtue of the umpire's decision and the pending grievance arbitration proceeding, those employees may well be "accreted" to the deli unit without being given an opportunity to express their representational desires. To avoid such a result, which clearly would be contrary to Board policy, and to permit the (OE) employees to express their desires regarding representation, we believe that the best alternative is the holding of a self-determination election. Phototype, Inc., 145 NLRB 1268 (1964)."

Thus, the Board determined that the invocation of a contractual proceeding to acquire representational status with respect to a group of unrepresented employees was sufficient to give rise to a question concerning representation, a process the Board has determined is within its exclusive province. See *Williams Transportation Company*, 233 NLRB 837 (1977)[2]; and *Marion Power Shovel Company, Inc*., 230 NLRB 576 (1977). The Union here, as of the time of the filing of the instant petition, was not the 9(a) representative of the unit in issue. It lost that status on June 6, 2000, when the Employer withdrew recognition. Thus, when it filed its arbitration request on October 6, 2000, it sought to reacquire that status through the grievance process. As in *Carr-Gottstein, supra*, this action was tantamount to a demand for recognition and entitles the Employer to invoke the Board's processes to resolve this question. To find otherwise would deny the unit employees the right to express their representational desires. Such a result clearly conflicts with statutory policy. That the union in *Carr-Gottstein*, was seeking to accrete employees to an existing unit as opposed to the Union's efforts here to be designated as the 9(a) representative of a unit of employees it once represented, is a distinction without a difference. For, in both instances, the unions are seeking to obtain representational status of employees without affording them their rights under Sections 7 and 9 of the Act to extend or deny such status. Accordingly, in furtherance of the clear statutory policy mandating such an option under the auspices of the Board, I find a question concerning representation exists and that an election is warranted.

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[2] See also *Ziegler Inc*., 333 NLRB No. 114 (2001), where the Board directed that a UC petition be processed to preclude the possibility that a pending grievance could result in an award which was incompatible with a prior decision of the Board that certain employees were historically excluded from the unit.

5. The parties stipulated, and I find, that the following unit is appropriate for the purposes of collective bargaining:

> All full-time and regular part-time building service employees working at 4200/4211 Avenue K, Brooklyn, New York, excluding all other employees, watchmen, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining

purposes by Local 32B-32J, Service Employees International Union, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before May 23, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with

these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by May 30, 2001.

Dated at Brooklyn, New York, May 16, 2001.

/S/ ALVIN BLYER

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